

Discussion of Allocation Framework for LPRSA OU-2 Remedy

**EPA, Region 2 – 290 Broadway, New York, NY
August 28, 2017**

Overview

- I. Suggested approach to allocation process
- II. EPA's allocation framework
- III. Issues and concerns
- IV. Discussion

I. Suggested Approach to Allocation Process

- Engage in a collaborative process with a representative group of parties to develop an expedited allocation framework that is transparent and fair, and that:
 - Does not divide PRPs into “middle,” “major,” or “government” groups based on incomplete or incorrect information
 - Allows for additional *de minimis*/cash out settlements based on an efficient and expeditious fact-gathering process
 - Encourages inclusion of additional PRPs and not just GNL recipients
 - Allows parties to exchange relevant nexus information and evidence to create a level playing field
 - Facilitates early buyout opportunities
 - Supports implementation of the OU-2 remedial action

II. EPA's Allocation Framework (Mar. 30, 2017)

4 PRP Groups

- *Early cash out parties* – “EPA has identified for immediate settlement those parties that are not associated with a disposal or release of any of the [8] COCs . . . identified in the OU2 ROD”
- *Middle parties* – “For parties that are not one of the 20 early cash out parties and are also not associated with the release of dioxins, furans, or PCBs into [the LPR], a cash out settlement might be appropriate.... EPA expects to use the services of a third party allocator before extending cash out settlement offers”
- *Government parties* – treated separately in an undisclosed manner
- *Major parties* – “Parties that are responsible for the release or discharge of dioxins, furans, or PCBs into the Lower Passaic River should participate in implementing or funding the remedy”

III. Issue #1 – Need for Transparent Process That Treats All Parties Fairly

- EPA's framework requires it to allocate percentages/amounts of remedial action costs to the 4 PRP groups. Fundamental questions include:
 - What is the basis for these 4 PRP groups (instead of performing, non-performing/funding, and orphan)?
 - What criteria will EPA use to determine the percentages/amounts for each group?
 - When will EPA determine them?
 - What evidence will EPA rely on to support them?
 - How will EPA determine the orphan share, which could be substantial?
 - How will EPA document the percentages/amounts allocated to each group and the orphan share?
 - What input will EPA allow GNL and non-GNL PRPs to have?

III. Issue #2 – Assignment of Parties to Groups

- EPA's assignment of private PRPs to "middle" and "major" groups at this juncture is likely to generate significant objection and lead to challenges that EPA's grouping decisions are arbitrary and capricious – especially in an allocation for a \$1.38 billion remedy (EPA's estimate)
- How is EPA deciding to group PRPs?
 - Lack of transparency as to the criteria EPA is applying (e.g., discharge of any COC risk drivers, pathways, other?)
 - Lack of transparency as to how EPA will ensure accuracy and completeness of its information on GNL, non-GNL, and orphan PRPs
 - Lack of transparency as to the legal positions and evidence EPA is relying on
 - Incomplete existing factual record and the need for some discovery or self-disclosure process that ensures parity and merit-based, fair, and reasonable grouping decisions

III. Issue #3 – Government Parties

- The government GNL recipients are PVSC and four municipalities (Newark, East Newark, Harrison, and Kearny) that owned or own sewer systems and/or CSO outfalls that have documented direct discharges to the river
- Many private GNL recipients are only connected to the river through the sewer system or CSOs
- EPA's treatment of government parties must be transparent and equal to EPA's treatment of private parties
- Government parties should pay their fair shares (including by raising additional taxpayer funds if necessary)

III. Issue #4 – Multiple Allocation Processes for Lower 8.3 Miles

- EPA's framework sets up three allocation processes for the lower 8.3 miles:
 - (i) "middle" parties with EPA neutral, (ii) "major" parties without EPA neutral, and (iii) government parties
- Three allocation processes increases the potential for:
 - Use of different allocation factors
 - Differences in weighing similar allocation factors
 - Differences in how to account for other parties' contributions (*i.e.*, how neutral in "middle" party allocation process accounts for "major" party, "government" party, and orphan party contributions and vice versa)
 - Legal challenges to any settlements for "middle," "government," or "major" parties based on differences in the three processes

III. Issue #5 – Limited PRP Focus

- EPA's framework is limited to only GNL recipients
- Many more PRPs exist, including municipalities and Significant Industrial Users of the POTW systems
- How does EPA plan to address the shares of the "missing" parties?
 - Invitation to participate in process?
 - Allocation of "missing" PRPs' shares to the 4 PRP groups? If so, what criteria, facts, and evidence is EPA planning to rely on?
- The shares of these "missing" parties must be considered in a fair allocation process for an estimated \$1.38 billion remedy that could cost much more and addresses only a portion of the site

III. Will EPA's Framework Result in an Approvable Settlement?

- Remedial action consent decrees must be fair, reasonable, and consistent with CERCLA's goals. *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003).
- District court must "independently scrutinize" the terms of the proposed settlement and cannot simply rely on EPA's representations that the settlement satisfies these requirements. *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014).
- *Procedural Fairness* – candor and transparency in process
- *Substantive Fairness* – rational determination of comparative fault (*i.e.*, a party's contribution to the LPRSA relative to other parties' contributions)
- *Reasonableness* – evaluation of, among other things, the "technical adequacy" and "probable effectiveness" of the remedy selected. *United States v. Cannons Eng'g*, 899 F.2d 79, 89-90 (1st Cir. 1990).

III. Will EPA's Framework Result in an Approvable Settlement?

- District court must:
 - Engage in a comparative analysis of the settlement amount to be paid by the settling parties in relation to their proportion of liability
 - Substantively assess the evidence purportedly justifying the settlement amount and share allocated to the settling parties
 - Explain why the evidence indicates that the consent decree is procedurally and substantively fair, reasonable, and consistent with CERCLA's objectives

Arizona, 761 F.3d at 1012.

III. Will EPA's Framework Result in an Approvable Settlement?

- Given the issues, many GNL recipients have concerns that EPA's proposed framework will be:
 - Costly
 - Time-consuming
 - Incomplete as it does not provide for participation by all PRPs
 - A precursor to additional bankruptcies due to the assignment of responsibility based on a sparse factual record
 - Unable to withstand legal challenges and obtain judicial approval of proposed settlements for "middle," "government," or "major" parties

IV. Discussion

- Engage in a collaborative process with a representative group of parties to develop an expedited allocation framework that is transparent and fair, and that:
 - Does not divide PRPs into “middle,” “major,” or “government” groups based on incomplete or incorrect information
 - Allows for additional *de minimis*/cash out settlements based on an efficient and expeditious fact-gathering process
 - Encourages inclusion of additional PRPs and not just GNL recipients
 - Allows parties to exchange relevant nexus information and evidence to create a level playing field
 - Facilitates early buyout opportunities
 - Supports implementation of the OU-2 remedial action